

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CAROL A. FULLER)	
Claimant)	
VS.)	
)	Docket No. 230,064
PRAIRIE HOMESTEAD)	
Respondent)	
AND)	
)	
CALIFORNIA COMPENSATION INSURANCE CO.)	
Insurance Carrier)	

ORDER

The respondent and its insurance carrier appealed the August 5, 1999 Award entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on November 24, 1999.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for the claimant. Ronald J. Laskowski of Topeka, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a November 24, 1997 accident and resulting injury to the right knee. After finding that claimant injured her right knee as alleged and that she provided the respondent with timely notice of the accident, the Judge awarded claimant benefits for a three percent permanent partial disability to the right leg.

The respondent and its insurance carrier contend the Judge erred. They argue that claimant failed to prove that (1) she injured her right knee at work and (2) she provided the respondent with timely notice of the accidental injury.

The only issues before the Appeals Board on this appeal are:

1. Did claimant injure her right knee while working for the respondent?
2. If so, did claimant provide the respondent with timely notice of the accident or injury?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Ms. Fuller alleges that on November 24, 1997, she injured her right knee while working in the kitchen for Prairie Homestead, a retirement center. On that day, she allegedly was checking turkeys in the oven and felt her right knee pop as she turned away from the oven. She also alleges that she notified her supervisor, Mr. Jack Williams, of the accident later that same day.
2. Ms. Fuller has worked for Prairie Homestead for more than 13 years. During that period, Ms. Fuller has filed approximately 17 incident reports, some of which pertained to relatively minor incidents such as being bumped by a co-worker and such as losing her balance after catching her foot in a pant leg. But Ms. Fuller did not prepare or file an incident report for the alleged November 24, 1997 accident despite the fact that she allegedly heard her knee pop and nearly fell to the floor. And despite allegedly believing the incident was significant enough to warrant reporting it to her supervisor that same day.
3. Although she knew that Prairie Homestead referred its employees to a specific health care provider for work-related injuries, Ms. Fuller did not request such referral. Instead, she chose to consult her personal physician, Dr. L. H. James. After seeing Ms. Fuller on two or three occasions, Dr. James referred her to Dr. John P. Estivo. Dr. James billed Ms. Fuller's private health insurance carrier for his services. Dr. James' office notes were not introduced into evidence. Nonetheless, at the preliminary hearing, Ms. Fuller testified she told Dr. James that she had injured her leg at work but the doctor did not record that history in his notes. She testified as follows:

Q. (Mr. Laskowski) And in this incident of November of 1997 you went to your own family doctor, as I understand it, is that true?

A. (Ms. Fuller) Yes.

Q. And did you turn those bills into your private health insurance?

A. Yes.

Q. You did not treat that as a work-related incident?

A. I told my doctor, Dr. James, that I had hurt my leg at work but he didn't, he didn't put it down as that.

Q. Do you have those first notes from Dr. James that we are seeming to be missing, let me back up. You just testified that Dr. James didn't put it down on his notes that you were hurt at work. How do you know that?

A. I told him about it but he didn't, as far as I know.

Q. Have you seen some notes?

A. No.

...

Q. (Mr. Laskowski) So if we saw Dr. James' notes at some point in time if we get these - -

A. (Ms. Fuller) Yes.

Q. - - you are pretty sure it is not going to say anything about being hurt on the job, right?

A. I believe so, yeah.

4. Mr. Williams denies that Ms. Fuller told him that she had injured her knee on the job. On approximately November 25, 1997, Mr. Williams noticed Ms. Fuller limping. At that time, when he asked Ms. Fuller what was wrong, she told him that she was getting old. Mr. Williams did not learn that Ms. Fuller was claiming that she injured her knee at work until December 15, 1997, when he received a call from Dr. Estivo's office requesting authorization to treat Ms. Fuller's knee.

5. During the general time frame of the alleged accident, Ms. Fuller told a co-worker, Ms. Linda Dollymiuk, that she was limping because of her arthritis. Ms. Dollymiuk testified:

Q. (Mr. Laskowski) Did you have any conversations with Miss Fuller about her knee or her medical condition?

A. (Ms. Dollymiuk) Well, yes.

Q. Tell the judge about the conversation that you had with her.

A. She would come in to give Jack something having to do with work, she was in her street clothes, she was going to use the restroom by the welding center. When she passed by she was limping and I asked her what happened. And she said nothing. And she said it was my arthritis acting up and that was the end of the conversation.

...

Q. (Mr. Laskowski) During the conversation did she say anything about injuring her knee or leg while lifting a pan of turkeys?

A. (Ms. Dollymiuk) No.

6. Considering the facts that Ms. Fuller (1) did not request medical authorization from the respondent's doctor, (2) did not ask to fill out an incident report although she had prepared many in the past, (3) did not mention to Ms. Dollymiuk that she had injured her knee at work, (4) filed Dr. James' medical bills with her private health care insurance carrier, and (5) testified at the preliminary hearing that Dr. James' medical notes did not contain a history of her sustaining a work-related accident despite the fact that she had not reviewed them, the Appeals Board finds Ms. Fuller's testimony unpersuasive. Instead, the Appeals Board finds Mr. Williams' testimony both credible and persuasive that Ms. Fuller did not tell him about her injuring her knee.

7. The greater weight of the evidence does not support Ms. Fuller's contentions that her knee injury occurred at work. Further, the evidence fails to establish that Ms. Fuller notified Prairie Homestead of her alleged accident or injury within ten days of its alleged occurrence. The record does not establish that the failure to notify the retirement center was due to just cause.

CONCLUSIONS OF LAW

1. The Award granting Ms. Fuller benefits should be reversed.

2. In workers compensation proceedings, workers have the burden to establish their rights to compensation and to prove the various conditions upon which their rights depend.¹

3. "Burden of proof" means the burden to persuade the trier of facts by a preponderance of the credible evidence that a party's position on an issue is more probably true than not when considering the whole record.²

4. Before an injury is compensable under the Workers Compensation Act, a worker must prove that his or her accident arose out of and in the course of employment and that he or she provided the employer with timely notice of the accidental injury.³ Generally, a worker has ten days to report the accidental injury to the employer or the claim is barred. But the ten-day period may be extended to 75 days when there is "just cause."⁴

¹ K.S.A. 1998 Supp. 44-501(a).

² K.S.A. 1998 Supp. 44-508(g).

³ K.S.A. 1998 Supp. 44-501(a).

⁴ K.S.A. 44-520.

5. Because Ms. Fuller has failed to prove that it is more probably true than not that she injured her right knee at work and that she provided timely notice of the accidental injury, the request for benefits must be denied.

AWARD

WHEREFORE, the Appeals Board reverses the August 5, 1999 Award. The request for benefits is denied. The Appeals Board adopts the Judge's orders for payment of costs as set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of December 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority and would affirm the Award. The outcome of this proceeding hinges upon the witnesses' credibility and only the Judge had the opportunity to assess both Ms. Fuller's and Mr. Williams' sincerity and credibility when they testified before him.

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Ronald J. Laskowski, Topeka, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director